Kollision USS Fitzgerald (DDG 62)

Aus THE MARITIME EXECUTIVE 04. SEPT 2020 (Übersetzung: Eberhard Hewicker)

Die beschädigte USS Fitzgerald

Das amerikanische National Transportation Safety Board (NTSB) hat jetzt den Abschlußbericht über die am 27. Juni 2017 erfolgte Kollision zwischen dem US Navy Zerstörer USS *Fitzgerald* und dem Containerschiff *ACX Crystal* veröffentlicht. Die USS Fitzgerald war erheblich beschädigt worden, und sieben Besatzungsmitglieder waren dabei zu Tode gekommen.

Am 16. Juni 2017 hatte USS *Fitzgerald* ihren Heimathafen Yokosuka, Japan, für eine Reise zu den Philippinen verlassen. In den frühen Morgenstunden des folgenden Tages lief das Kriegsschiff mit 22 kn in der Sagami Nada Bay, südlich der Tokyo Bay, nach Süden. Ihre Positions-Laternen waren gelöscht und das AIS abgeschaltet. Das 220 m lange Containerschiff *ACX Crystal* (21 Mann Besatzung) fuhr mit 18 kn ONO-Kurs auf einer Reise von Nagoya nach Tokio.

Um 01:24 machte USS *Fitzgerald* eine leichte Kursänderung von 10° nach Steuerbord, wodurch sie auf Kollisionskurs zur *ACX Crystal* geriet. Der Grund für diese Kursänderung ist nicht bekannt. Keines der beiden Schiffe hatte das andere über Funk angerufen als sich die Entfernung stetig verminderte. Die Brückenwache des

ausweichpflichtigen Kriegsschiffes handelte zu spät, um die Kollision noch zu verhindern.
Um 01:30 riß der Wulstbug der *ACX Crystal* die Steuerbordseite der USS *Fitzgerald* unterhalb der Wasserlinie auf, so dass ein Schlafraum voll Wasser lief und sieben Seeleute getötet wurden. Der Rumpf des Containerschiffes zerstörte einen Teil der Aufbauten unterhalb der Brücke der USS Fitzgerald, darunter auch die Kommandantenkammer.
Die *ACX Crystal,* als das bei weitem größere Schiff, erlitt nur ungefährliche Beschädigungen oberhalb der Wasserlinie, und niemand wurde verletzt.
Wie zuvor schon die US Navy, so kam auch das NTSB zu dem Ergebnis, dass der primäre Grund für den Unfall eine Nichtbeachtung der COLREGS sei (Internationale Regeln zur Verhütung von Zusammenstößen auf See). Dazu kamen noch unzureichende Kommunikation, unzureichende Ausbildung und ungenügende Übersicht.

USS Fitzgerald erreicht den Hafen von Pascagoula (Mississippi) an Bord der Transshelf

Das NTSB stellte dazu insbesondere fest:

- Das Brückenteam der USS Fitzgerald versäumte es in dieser Situation kreuzender Kurse als ausweichpflichtiges Schiff rechtzeitig und deutlich dem anderen Schiff Raum zu geben (das war vielleicht der Haupt-Grund für den Unfall).
- Der Wachoffizier der *ACX Crystal* ergriff nur unzureichende Maßnahmen als Unklarheit über die Absichten des Kriegsschiffes bestand.
- Auf der USS Fitzgerald gab es nur eine unzweckmäßige Kommunikation und Kooperation zwischen Brücken-Team und der Operationszentrale (CIC)

- Der Kommandant der USS Fitzgerald hatte die Reise unzureichend geplant und vorbereitet
- Die Besatzung der USS Fitzgerald war erschöpft
- Die übliche Praxis der US Kriegsschiffe, keine eigenen AIS Informationen auszustrahlen, war mitursächlich für den Unfall
- die US Navy hat die Einsatzplanung des Kriegsschiffes unzureichend überwacht, so dass Einsatzaufgaben, Ausbildung und körperliche Leistungsfähigkeit der Besatzung in Konflikt gerieten (wie auch die US Navy und das GAO bereits festgestellt haben)

Der Untersuchungsbericht des NTSB hat der US Navy drei Maßnahmen empfohlen, welche alle drei bereits von der US Navy aufgriffen worden sind:

- in der gesamten Flotte sollten die Ausbildungs- und Prüfungsbedingungen der Deck-Offiziere in Bezug auf die COLREGs überprüft und verbessert werden
- Ausbildung in Bridge Resource Management sollte in einem regulären Kurs gelehrt werden, wobei die Kooperation mit dem CIC (Operationszentrale) zu berücksichtigen ist.
- Alle Kriegsschiffe sollten angewiesen werden, eigene AIS Informationen auszustrahlen, wenn sie sich in der Nähe von Handelsschiffen befinden, es sei denn, taktische oder strategische Interessen sprächen dagegen.

Die Zeitschrift Europäische Sicherheit schrieb im Februar 2020 :

Die U.S. Navy hat den Zerstörer USS "Fitzgerald" (DDG 62) der "Arleigh Burke"-Klasse wieder instandgesetzt und in den Dienst der Flotte gestellt.

Der Zerstörer war 2017 im Pazifik vor Japan mit einem Containerschiff kollidiert und hatte neben 17 (?) Toten und zahlreichen Verwundeten erhebliche Schäden am Schiffskörper und im Schiffsinneren erlitten. Einige Wochen später kollidierte der Zerstörer USS "John S. McCain" (DDG 56) in der Malakkastraße mit einem zivilen Tanker. Der Zerstörer verzeichnete zehn Tote und große Schäden am Schiffskörper. Die USS "John S. McCain" war nach Instandsetzung im Oktober 2019 wieder einsatzfähig. Die USS "Fitzgerald" aber benötigte eine Werftliegezeit von ca. drei Jahren, um ihre massiven Schäden zu beheben. Bei den Havarieverhandlungen wurde festgestellt, dass die Brückenbesatzung auf beiden Zerstörern durch Versäumnisse, Inkompetenz und unklare Befehlsgebung die Kollisionen verursacht haben.

Ende

USS Fitzgerald and ACX Crystal collision: The Fifth Circuit Court of Appeals delineates the reach of personal jurisdiction

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The Court, sitting en banc, held that the Fifth Amendment due process test for personal jurisdiction governed this admiralty dispute and mirrors the Fourteenth Amendment test. Applying the test, the Court concluded that Nippon Yusen Kabushiki (NYK) had insufficient contacts with the United States to justify exercising personal jurisdiction over a foreign corporation for claims arising from a collision in foreign waters. This means that United States Navy Sailors' claims for wrongful death and personal injury must be pursued in a foreign court.

Background

On 17 June 2017, the **ACX CRYSTAL ,** a 730-foot foreign flagged container ship chartered by NYK, collided with the destroyer **USS FITZGERALD** in Japanese territorial waters.

Several midship compartments on the **FITZGERALD** flooded, killing seven United States Navy sailors and injuring dozens of others. Personal representatives of the deceased sailors sued NYK in federal court, asserting wrongful death claims under the Death on the High Seas Act, 46 U.S.C. § 30301 et seq. The injured sailors and their families sued NYK separately, asserting negligence and loss of

consortium claims. In both cases, plaintiffs alleged that NYK, a foreign corporation headquartered in Japan, was amenable to federal court jurisdiction under Fed. R. Civ. P. 4(k)(2) based on its "substantial, systematic and continuous contacts …" with the United States. NYK is a global logistics company that transports cargo by air and sea. On the seaside of its operations, NYK's fleet of owned and chartered vessels includes bulk carriers, container ships, car carriers, tankers, shuttle tankers, drill ships, and LNG carriers. Between 2017 and 2019, about seven percent of NYK's worldwide port calls were in the United States, totaling about 1,500 calls annually. Because of NYK's shipments bound for the United States, NYK litigates in American courts. Since 2010, NYK has filed approximately thirty lawsuits in federal courts, most involving claims for freight charges. And, occasionally, NYK and its vessels are sued in American courts. Typically for cargo damaged en route, or for injuries occurring during cargo operations in the United States. However, overall, NYK's business in the United States and North America accounts for less than ten percent of its annual revenue.

The Dispute

Fed. R. Civ. P. 4(k)(2) provides:

Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

NYK was not subject to jurisdiction in any state court in the United States because plaintiffs could not meet the established due process test for personal jurisdiction under the Fourteenth Amendment, which limits state court jurisdiction.

Personal jurisdiction under the Fourteenth Amendment requires a finding of either general or specific jurisdiction over a non-resident defendant. General jurisdiction is only appropriate when a non-resident corporation's contacts with a forum state are so "continuous and systematic" that the defendant is essentially "at home" in the forum state. Daimler AG v. Bauman, 571 U.S. 117, 139, 134 S. Ct. 746, 761 (2014). **In other words, the forum state must be considered the center of the non-resident's activities or a surrogate for its place of incorporation or head office. If general jurisdiction is found, then the corporation is amenable to suit for any of its activities anywhere in the world.**

If the non-resident corporation is not at home in the forum state, then the alternative is specific jurisdiction. Specific jurisdiction is appropriate when:

1) a non-resident corporation avails itself of the benefits and protections of the forum state; and

2) the claims arise out of or result from the corporation's forum related activities.

In other words, the claims must arise from or relate to the business activities conducted in the forum state.

Since plaintiffs could not show that NYK was "at home" in any state, and since plaintiffs' claims did not arise from or relate to its business activities in any state, plaintiffs filed in federal court under Fed. R. Civ. P. 4(k)(2), arguing that the due process test for personal jurisdiction under the Fifth Amendment – which limits federal court jurisdiction – should be different than the Fourteenth Amendment test.

Specifically, because the United States Supreme Court has yet to definitively speak to the Fifth Amendment test, plaintiffs proposed a "national contacts" test whereby NYK, a foreign corporation headquartered in Japan, was amenable to federal court jurisdiction under Fed. R. Civ. P. 4(k)(2) based on its "substantial, systematic and continuous contacts …" with the United States, regardless of whether the contacts are sufficient to consider NYK at home in the United States. Said differently, in the plaintiffs' view, the Fifth Amendment due process inquiry is simply whether a defendant, sued on a federal claim, was doing enough systematic and continuous business in the United States that it had fair notice it could be subjected to suit in federal courts.

NYK moved to dismiss the suits for lack of personal jurisdiction, arguing that plaintiffs' proposed test was inconsistent with the United States Constitution and laws. The United States District Court for the Eastern District of Louisiana agreed and granted NYK's motion. The cases were consolidated on appeal, and on 30 April 2021 the United States Court of Appeals for the Fifth Circuit affirmed the district court judgment. On 14 May 2021 plaintiffs filed a petition for rehearing en banc (rehearing by the entire Court).

The Decision

In Stephen Douglass, et al. v. Nippon Yusen Kabushiki Kaisha, 20-30382 c/w 20-30379 (5th Cir. August 16, 2022), Judge Edith Jones writing for the majority of the Court rejected plaintiffs' proposed national contacts test. Five of the seventeen justices dissented.

Noting that the Fourteenth and Fifth Amendment Due Process Clauses use the same language to protect persons from the deprivation of "life, liberty, or property, without due process of law" and serve the same purpose, the Court dismissed plaintiffs' foundational contention that the Fourteenth Amendment Due Process Clause vindicates federalism principles that are irrelevant under the Fifth Amendment. Acknowledging that the Fifth Amendment focuses on the United States' sovereign limits rather than the states' reciprocal sovereign limits, the Court nonetheless disagreed with the premise that the distinction warranted a more permissive standard under the Fifth Amendment. Mainly, because in the Court's view the emphasis on sovereignty was not the focus of the analysis.

Citing to Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099 (1982), the Court stated that individual liberty is what the Supreme Court emphasizes as the foundation of the personal jurisdiction requirement. That requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." Id. at 2104.

On this basis, the Court held that the "tried-and-true" dichotomy between general and specific jurisdiction applies under the Fifth Amendment.

Specifically, the Fifth Amendment due process test for personal jurisdiction mirrors the Fourteenth Amendment test, except that the Fifth Amendment test looks at contacts with the United States as a whole, rather than any one state. Further, because neither complaint alleged that the federal claims at issue arose out of or were related to NYK's contacts with the United States, the Court went on to find that NYK could only be amenable to the district court's jurisdiction under a general jurisdiction theory. Meaning, NYK was amenable to jurisdiction if and only if its contacts were so continuous and systematic as to render it essentially at home in the United States. Turning to NYK's specific contacts, the Court found that exercising general jurisdiction over NYK did not comport with its Fifth Amendment due process rights.

The Court recognized that NYK's contacts with the United States are, in absolute terms, substantial. NYK vessels call on at least forty-one separate ports, with several vessels dedicated exclusively to delivering cars between Japan and the United States. At one time, NYK even operated twenty-seven shipping terminals and six air-cargo terminals in the United States, with its North American entities generating about $1.47 billion in consolidated revenue every year.

But the Court also noted that the general jurisdiction test is an inherently comparative inquiry. And comparatively, NYK's contacts with the United States comprise only a small fraction of its worldwide contacts.

Therefore, the Court found that the United States is not the center of NYK's activities or a surrogate for NYK's head office or place of incorporation.

Comments by the Court

In footnotes 5 through 7 of the majority Opinion, the Court felt it was important to place the Opinion in further context. The Court emphasized that NYK was a time charterer of the **ACX CRYSTAL**, and that time charterers typically have little or no control over the vessel's navigation. As such, a time charterer "almost never bears liability for a collision stemming from navigational error." Citing Moore v. Phillips Petroleum Co., 912 F.2d 789, 792 (5th Cir. 1990).

Thus, in the Court's view, even if plaintiffs could establish personal jurisdiction over NYK, "their claims would face other substantial hurdles." Including the fact that the after-accident reports issued by the National Transportation Safety Board and the Japanese Transport Safety Board largely fault the United States Navy for the collision and, according to the Court, neither places any fault on NYK. The Court noted that the personal representatives of the deceased sailors and the injured sailors and their families also sued the owner of the ACX Crystal, Olympic Steamship Company, and its bareboat charterer, Vega Carriers Corporation, both Panamanian corporations, in Japan for the same injuries at issue in this lawsuit.

Gard Comment

Had the accident occurred in Untied States waters, the District Court presumably would have had jurisdiction over NYK, as well as the owner and the bareboat charter because the incident would have likely satisfied the specific jurisdiction requirements under the Fifth Amendment as applied to admiralty claims. This decision does, however, set a limitation as to personal jurisdiction for claims against a foreign corporation that arise outside of the United States where the claim does not arise from activities of the corporation in the United States. **Source: GARD**

The **ACX CRYSTAL** navigating the Singapore Strait July 2020